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IN THE

Supreme Court of the United States

October Term, 1932.

No. 634

DAVID DAUBE,

Petitioner,

v.

THE UNITED STATES,

Respondent.

BRIEF FOR PETITIONER.

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May It Please The Court:

The opinion of the Court of Claims (R. 8-36) is reported in *59 F. (2d) 842.* The supplemental opinion of the Court of Claims (R. 43-47) is reported in *1 F. Supp. 771.*

On March 4, 1933, this Court granted the writ of certiorari to review the judgment of the Court of Claims with respect to the 1919 overpayment but denied the writ with respect to the 1918 overpayment.

QUESTION PRESENTED.

The question presented in this case is whether *Section 3226, R. S.*, bars the recovery of an overpayment duly and regularly and timely allowed by the Commissioner of Internal Revenue because the petitioner did not file a claim for the refund of said overpayment.

STATEMENT.

On March 29, 1924, within five years from the time petitioner's 1919 income tax return was due, the Commissioner of Internal Revenue signed the final schedule allowing petitioner an overpayment of $2628.26 for the calendar year 1919. On April 23, 1924, the Disbursing Clerk of the Treasury Department issued a check payable to the petitioner for the amount of this overpayment together with the amount of a 1918 overpayment with respect to which the writ was denied and forwarded this check to the Collector of Internal Revenue for delivery to the petitioner. The Collector of Internal Revenue did not deliver the check to the petitioner but returned it (R. 10) and after its return a Deputy Commissioner of Internal Revenue wrote the Collector the following letter (R. 6, 42):

"TREASURY DEPARTMENT
Washington

July 28, 1924

A&C:CAP:R
Collector of Internal Revenue,
Oklahoma City, Oklahoma.

Reference is made to your letter of June 10 (VCD: LW:A—Claims Div.) and also to a memorandum from the Income Tax Unit of the Bureau under date of July 14, a copy of which is enclosed, relative to Treasury check #432040, dated April 23, drawn to the order of David Daube, Ardmore, Oklahoma, for $13,502.90.

The check was issued in accordance with over-assessments of $22,151.88 and $2,628.26, listed for refund on schedule IT:A:8285. The check has been returned by your office and has been deposited as a repayment to the appropriation from which drawn.

In this connection, you are authorized to apply this amount as a credit against an additional 1917 assessment of Westheimer & Daube, a partnership, appearing on your March 1924 list, page 1, line 7, special #17.

(Signed)
H. F. Mires,
Deputy Commissioner.

CrRr
Enclosure"

On August 7, 1924, the Collector made on his books the credit of the overpayment of 1919 tax upon the taxes claimed to be due from a partnership of which the petitioner was a member, for the partnership's taxable year 1917 (R. 15). The parties agreed that the Statute of Limitations barred the Commissioner's right to collect the 1917 tax from the partnership on April 1, 1924 (R. 13).

The defendant contended that the plaintiff's suit was barred by *Section 3226 of the Revised Statutes* because the plaintiff did not file a claim for the refund of the 1919 taxes (R. 13).

> "The majority opinion denies recovery of the amount of $2,628.26 allowed by the Commissioner for 1919 on the ground that the Commissioner's allowance did not constitute an obligation of the United States and that the suit is prohibited by *section 3226, R. S.*, since plaintiff filed no claim for refund for 1919" (R. 36).

While the above statement embodies the gist of the case and is sufficient to present the question for decision, yet for a more complete understanding of the case the following facts should be added.

The petitioner was a member of the partnership of Westheimer & Daube, doing business in Ardmore, Oklahoma (R. 8). On June 16, 1919, petitioner filed with the Collector of Internal Revenue an individual income tax return for the calendar year 1918, showing a tax liability for that year of $72,807.41, which he duly paid (R. 8). In April 1922 this partnership executed a waiver of assessment for the year 1917 (R. 8-9), which expired April 1, 1924 (R. 13). Petitioner filed his 1919 income tax return on June 19, 1920 (R. 36).

On November 10, 1923, the Commissioner mailed to the petitioner a statement which showed that the Commissioner had found additional taxes due from the petitioner for the years 1916, 1917 and 1920, that for the year 1918 there had been an overassessment in the amount of $22,151.88, and for the year 1919 an overassessment in the amount of $2,628.26, and that there was altogether a net overassessment of $13,502.96 (R. 9). This letter granted the petitioner thirty days to file an appeal (R. 37). Apparently no appeal was filed because on January 26, 1924, the Commissioner signed an assessment list making the additional assessments referred to in this letter against the plaintiff and on January 31, 1924, he signed a schedule of overassessments scheduling the overassessments above referred to. This schedule was sent to the Collector with instructions to examine the accounts of the taxpayer and apply the overpayment as a credit against any taxes due, entering the same on the schedule, which the Collector did, and after signing the schedule returned it to the Commissioner of Internal Revenue. When returned it showed that $11,277.24 of the overpayment of 1918 taxes had been credited against the additional assessments for 1916, 1917 and 1920. This credit is not questioned in this case. At the same time the Collector made

out a schedule of refunds and credits, dated February 27, 1924, which he forwarded to the Commissioner along with a schedule of overassessments. This schedule listed as refundable $10,874.64 out of the taxes paid for 1918, and $2,628.26 out of the taxes paid for 1919 (R. 9).

The Commissioner signed an approval of this schedule and an authorization of the payment thereof on March 29, 1924 (R. 10). Pursuant to this authorization the check for $13,502.90, hereinabove referred to, was issued (R. 10).

On February 23, 1924, the petitioner and the other members of the partnership, Westheimer & Daube, signed and mailed to the Commissioner an agreement that the 1918 overpayment aforesaid might be applied against partnership taxes for the year 1917. The year 1919 was not mentioned in the agreement. Because of this agreement the Court of Claims denied recovery for the year 1918 and with respect to 1918 the writ was not granted so that the 1918 question is not present in the case.

ERRORS TO BE URGED.

The Court of Claims erred in holding that the petitioner was barred by *Section 3226 of the Revised Statutes* from recovering the 1919 overpayment because he did not file a claim for refund notwithstanding the said overpayment had been duly and timely allowed by the Commissioner of Internal Revenue.

STATUTES INVOLVED.

Section 252 of the Revenue Act of 1921 (Chap. 136, 42 Stat. at L. 268), which was in force at the time the Commissioner signed the final schedule allowing the 1919 overpayment and at the time the Treasury check to the order of the plaintiff was issued, reads as follows:

"*Sec. 252.* That if, upon examination of any return of income made pursuant to this Act, the Act of August 5, 1909, entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' the Act of October 3, 1913, entitled 'An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes,' the Revenue Act of 1916, as amended, the Revenue Act of 1917, or the Revenue Act of 1918, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of *section 3228 of the Revised Statutes*, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided*, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer: *Provided further*, That if upon examination of any return of income made pursuant to the Revenue Act of 1917, the Revenue Act of 1918, or this Act, the invested capital of a taxpayer is decreased by the Commissioner, and such decrease is due to the fact that the taxpayer failed to take adequate deductions in previous years, with the result that an amount of income tax in excess of that properly due was paid in any previous year or years, then, notwithstanding any other provision of law and regardless of the expiration of such five-year period, the amount of such excess shall, without the filing of any claim therefor, be credited or refunded as provided in this section: *And provided further*, That nothing in this section shall be construed to bar from allowance claims for refund filed prior to the passage of the Revenue Act of 1918 under *subdivision (a) of section 14 of the Revenue Act of 1916*, or filed prior to the passage of this Act under *section 252 of the Revenue Act of 1918*."

The above statute is applicable to the case at bar because the petitioner's 1919 return was not due earlier than March 15, 1920, and five years from that date did not expire until March 15, 1925. The overpayment for 1919 in the case at bar was allowed March 29, 1924, and the check for it was issued by the Treasury Department in the year 1924, well within the five-year period.

Section 3226 of the Revised Statutes, as re-enacted in *Section 1113 of the Revenue Act of 1926 (U. S. C. Title 26, Sec. 156)*, which was in force when this suit was brought, reads as follows:

> "*Sec. 3226.* No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

Sections 607 and 609 of the Revenue Act of 1928 (Chap. 852, 45 Stat. at L. 791, 874, 875 U. S. C. Title 26, 2607) read in the applicable part as follows:

> "*Section 607. Effect Of Expiration Of Period Of Limitation Against United States.*—Any tax (or any interest, penalty, additional amount or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto, shall be considered an overpayment. * * *
>
> "*Section 609. Erroneous Credits.*
>
> "(a) *Credit Against Barred Deficiency.*—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under *section 607.*
>
> * * *
>
> "(c) *Application Of Section.*—The provisions of this section shall apply to any credit made before or after enactment of this Act."

THE ARGUMENT.

The Court Erred in Holding That the Provisions of Section 3226 of the Revised Statutes Were Applicable to This Case and That the Petitioner Could Not Recover Because He Had Not Filed a Refund Claim.

Petitioner respectfully submits to the Court that the statement of Judge Littleton in his dissenting opinion in the case at bar, *59 F. (2d) 842, at page 850* (R. 28), as follows:

> "In so far as concerns the Commissioner's allowance of the amounts involved and the nature of the plaintiff's cause of action, as stated in his petition, I can see no essential difference between this case and the case of *Bonwit Teller & Co. v. United States, 283 U. S. 258,*"

is manifestly correct.

The case of *Bonwit Teller & Co. v. United States, 283 U. S. 258,* is authority that *Section 3226 of the Revised Statutes* has no application to a suit for the recovery of an overpayment duly and seasonably allowed by the Commissioner of Internal Revenue. In the case of *Bonwit Teller & Co.*, the plaintiff's suit would have been barred if *Section 3226 of the Revised Statutes* was applicable, because the suit was not brought within five years after the date the overpayment was made. This Court, however, decided that this statute had no application to a case where the Commissioner had duly and seasonably allowed an overpayment. The Court said, in *283 U. S. 258, at page 265:*

> "The government further contends that, even if the Commissioner's allowance was authorized, this suit is barred by *Rev. Stat. 3226*, as amended. *U. S. C. title 26, Sec. 156.* It provides that no suit for the recovery

of any internal revenue tax alleged to have been erroneously collected shall be begun after five years from the payment of such tax. The overpayment made was more than five years before the complaint was filed. This case is not within the clause giving two years after disallowance because here the claim was allowed. Plaintiff pleads its claim in two forms. The first is based upon the issue and delivery of the Commissioner's certificate showing plaintiff entitled to a refund in the amount specified. The second alleges an account stated showing that there is due plaintiff the amount claimed. The action is not for the overpayment of the tax in 1919, but is grounded upon the determination evidenced by the certificate issued by the Commissioner May 12, 1927. Upon delivery of the certificate to plaintiff, there arose the cause of action on which this suit was brought. *United States v. Kaufman, 96 U. S. 567, 570, 24 L. ed. 792, 793; United States v. Real Estate Sav. Bank, 104 U. S. 728; 26 L. ed. 908; Bank of Greencastle's Case, 15 Ct. Cl. 225.* There is no merit in the contention that the suit is barred."

The Court of Claims held that the Commissioner's allowance of the overpayment in the case at bar did not constitute an account stated at common law. It is not and was not the contention of the petitioner that such allowance technically creates an account stated at common law, but it is and was the contention of the petitioner that by a series of decisions of this Court the Commissioner's allowance of the overpayment is the equivalent of an account stated and gives rise to a cause of action against the United States and a showing of this allowance makes a *prima facie* case. In *United States v. Kaufman, 96 U. S. 567*, which is cited and followed in the *Bonwit Teller Case, supra*, this Court said:

> "*To say the least, the allowance of a claim under this statute (3426, R. S.) is equivalent to an account*

stated between private parties, which is good until impeached for fraud or mistake. It is not the allowance of an ordinary claim against the Government, by an ordinary accounting officer, but the adjudication by the first tribunal to which the matter must by law be submitted. * * *, when submitted, and when allowed upon the adjudication, the liability is complete until in some appropriate form it is impeached. When, therefore, the Court found the adjudication against the Government, without impeachment, the liability to pay was established." (Italics ours.)

In *United States v. Savings Bank, 104 U. S. 728*, the Court at page *733* said:

"And we held that the allowance of a claim by the Commissioner under this section, was equivalent to an account stated between private parties, and binding on the United States, until in some appropriate form it was impeached for fraud or mistake, and that if not paid on proper application through the accounting officers of the Treasury Department, an action might be maintained on it in the Court of Claims, because such an allowance raised an implied promise on the part of the United States to pay any amount that might actually be due the claimant."

Again the Court said:

"All we said then and all we say now is, that if payment is not made by reason of the refusal of any of the officers of the department to pass or pay the claim after it has once been allowed by the Commissioner, the allowance may be used as the basis of an action against the United States in the Court of Claims, where it will be *prima facie* evidence of the amount that is due, and put on the Government the burden of showing fraud or mistake. This burden is not overcome by proving that some other officer in the subsequent progress of the claim through the department declined to do what the law or treasury regulations required of him before payment could be obtained. The fact of fraud or mistake must be estab-

> lished by competent evidence the same as any other fact in issue. An allowance by the Commissioner in this class of cases is not the simple passing of an ordinary claim by an ordinary accounting officer, but a statement of accounts by one having authority for that purpose under an Act of Congress."

This Court plainly stated in the above case that the allowance by the Commissioner

> "may be used as a basis of an action against the United States in the Court of Claims, where it will be *prima facie* evidence of the amount which is due, and put on the Government the burden of showing fraud or mistake."

The United States, in its brief in opposition to the petition for the writ of certiorari, for the first time raised the point that "examination of the petition in the Court below clearly shows that petitioner made no attempt to plead an account stated," and on this basis it claims that petitioner should not recover.

In the case of *United States v. Kaufman, 96 U. S. 567*, this Court, speaking through Chief Justice Waite, at page *570* said:

> "And as against the Government there are no common law actions; any appropriate actions within the scope of the jurisdiction of the Court of Claims may be resorted to, unless specially prohibited."

Neither the statutes of the United States nor the rules of the Court of Claims require that common law pleading should be embodied in the petition in that Court. All that Rule 7 of the Court of Claims requires is "a plain statement of the facts". In paragraph 8 of its petition (R. 4) the petitioner pleaded the allowance of $13,502.90 and made a part of its pleading the Deputy Commissioner's letter directing the Collector to make the credit. This

letter (R. 6) plainly states the allowance of the overassessments "listed for refund on Schedule IT:A:8285". In paragraph 9 of the petition he alleged the allowance of the overassessments by the Commissioner of Internal Revenue (R. 4, 5). The United States did not demur to the petition and did not make any motion for an order to make it more definite and certain, but on the contrary, all the facts in the case at bar were stipulated and it entered into a written stipulation with the petitioner setting up all these facts and submitting the facts to the Court. It is too late now to claim that plaintiff cannot apply the law to the facts so stipulated because of an alleged defect in pleading. The legal theory of recovery need not be alleged. *Bemis Bros. Bag Co. v. United States*, ... *U. S.* .....

In the argument in the Court of Claims the plaintiff cited and relied upon the decision of this Court in the *Bonwit Teller Case* and it was not claimed by the Government that the petitioner could not recover under that decision because of any defect in his pleading. The Court of Claims did not deny recovery because it considered the pleading insufficient, but denied recovery for the reasons previously stated. As stated in the dissenting opinion (R. 30), the Court understood that

> "the plaintiff in this case bases his suit upon the Commissioner's allowance of the amount sued for, as evidenced by the Schedule of Refunds approved March 29, 1924."

In the words of this Court in the case of *United States v. Savings Bank, 104 U. S. 728, at page 733*, the approval of this schedule "raised an implied promise on the part of the United States to pay any amount that might actually be due the claimant." It is upon this implied promise, thus raised, that the suit in the case at bar is brought, and the Court of Claims erred in holding that this allow-

ance did not raise an implied promise on the part of the United States to pay the amount allowed.

When the Commissioner signed his final schedule allowing the refund on March 29, 1924, it was then and there allowed under the decision of this Court in the case of *Girard Trust Company v. United States, 270 U. S. 163.* (See also *United States v. Swift & Company, 282 U. S. 468.)*

The signing of this schedule was the last connection the Commissioner had with this case. The facts show that the Collector and a Deputy Commissioner, both subordinate officers of the Department, prevented the delivery to the plaintiff of the check issued by the Commissioner's authority and undertook to credit part of the amount of it on an outlawed tax. Where the Commissioner has made an allowance the burden placed upon the Government

> "is not overcome by proving that some other officer in the subsequent progress of the claim through the Department declined to do what the law or Treasury regulations required of him before payment could be obtained." *(United States v. Savings Bank, 104 U. S. 728, at page 734.)*

For the reasons elaborately stated in the briefs for the petitioner and the briefs *amici curiae* in *Graham v. Goodcell, 282 U. S. 409,* we believe that the Statute of Limitations existing prior to the enactment of the Revenue Act of 1926 not only barred the remedy but extinguished the liability and it seems to be so stated by this Court in *Mascot Oil Company v. United States, 282 U. S. 434, at page 436.* But whether it did is immaterial in view of the fact that the Statute expressly provides that credits made after the Statute of Limitations has run shall be void and that payments made after the running of the Statute of Limitations shall be refunded.

The holding of the Court of Claims in the case at bar that a claim for refund must be filed seems to us to be squarely in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the case of *William J. Friday & Company v. United States, 61 F. (2d) 370.*

CONCLUSION.

The approval of the Schedule of Refunds by the Commissioner on March 29, 1924, in the words of this Court in the case of the *United States v. Savings Bank, 104 U. S. 728, at page 733,* "raised an implied promise on the part of the United States to pay any amount that might actually be due the claimant," and the fact that the Deputy Commissioner and the Collector prevented the payment of this money to the plaintiff is no defense, for, as this Court said in the same case, the burden of proof placed upon the Government by this allowance

> "is not overcome by proving that some other officer in the subsequent progress of the claim through the Department declined to do what the law or Treasury regulations required of him before payment could be obtained."

For the foregoing reasons the judgment of the Court of Claims should be reversed with directions to enter judgment for the petitioner for the amount of the 1919 overpayment.

All of which is respectfully submitted.

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Chicago, March 15, 1933.